IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, Defendant. ERIC KENNIE, *et al.*, Defendant-Intervenors, TEXAS STATE CONFERENCE OF NAACP BRANCHES, *et al.*, Defendant-Intervenors, TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND, *et al.*, Defendant-Intervenors, TEXAS LEGISLATIVE BLACK CAUCUS, *et al.*, Defendant-Intervenors, VICTORIA RODRIGUEZ, *et al.*, Defendant-Intervenors.	CASE NO. 1:12-CV-00128 (RMC-DST-RLW) Three-Judge Court

THE ATTORNEYGENERAL'S MOTION FOR CLARIFICATION ABOUT THE SCHEDULING ORDER AND TO RESET THE TRIAL DATE

The Attorney General submits this motion for clarification of the remaining deadlines set forth in the Initial Scheduling Order (Mar. 27, 2012) (ECF 43) governing this case and to reset the trial date. As described below, Texas has failed to produce critical discovery in a timely matter or at all; and has asserted wide-ranging, shifting, and sequential privilege claims that will continue to require significant resources from the parties and the Court to resolve. These discovery delays have been caused by the State's own conduct and strategic decisions, and have occurred despite the Attorney General's best efforts to facilitate the expedited litigation of this matter. While the Attorney General shares the parties' and the Court's interest in resolving this matter as quickly as is reasonable, the State's litigation decisions and discovery delays have rendered a July 9, 2012 trial date both impractical and severely prejudicial to the Attorney General. *See Florida v. United States*, No. 1:11-cv-1428 (D.D.C. filed Aug. 1, 2011) (three-judge court) (denying in part the state's motion to expedite judicial preclearance litigation because "the abbreviated schedule proposed by Florida would run an unacceptable risk of depriving the United States and Defendant-Intervenors of a 'full opportunity to conduct discovery.'" (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986))). The current schedule also unduly burdens the Court with unworkable timetables, and risks depriving the Court of the clear factual record and reliable expert analysis needed to facilitate the Court's ultimate determination of the complex questions that may be presented in this case.

In furtherance of the expedited schedule set by the Initial Scheduling Order and the State's interest in obtaining an expeditious ruling on its statutory claim, the Attorney General has acted in good faith and with haste. The State of Texas, which professes that "implementing SB 14 for the November 2012 elections is the paramount goal of this litigation," (ECF 83) has taken precisely the opposite approach at every step. The State's conduct throughout discovery has

impeded the exchange of discovery which the Attorney General must obtain to defend this action. Texas has delayed production of central documents, including the full legislative history of S.B. 14 and other photo identification bills necessary to ascertain the State's intent in enacting S.B. 14, and the fields from several state databases necessary to determine the effect of S.B. 14 on the State's minority voters.

Compounding the delays caused by the State's overdue and ongoing production of essential documents, the State has asserted a series of various privileges whose contours have shifted over time. While the State is well within its right to assert non-frivolous privileges to shield itself from discovery, the State's decision to assert privileges sequentially has hindered discovery. As the Court noted, the privileges invoked by the State present complicated and important legal issues that cannot and should not be resolved in haste.

Although the State has requested a speedy decision from this Court, it has been unable or unwilling to meet the rigorous discovery deadlines that follow from a trial date of July 9, 2012. Thus, it is increasingly unlikely that the Attorney General will obtain all necessary discovery from the State by the close of discovery on June 15, 2012. With only three weeks between that date and the commencement of trial on July 9, 2012, the Attorney General believes that the only practical outcome is to adjust the remaining deadlines and trial date. Accordingly, the Attorney General respectfully requests that the Court vacate the remaining deadlines set forth in the Initial Scheduling Order and reset these deadlines after all privilege motions are filed, briefed, and ruled upon.

A. The State Considerably Delayed the Section 5 Administrative Review Process by Failing to Produce Necessary Information

It is important to note that the exceedingly compressed time period that the State has requested for full resolution of this litigation is a direct consequence of the State's failure to

provide the information necessary for the Attorney General's prompt administrative review of S.B. 14. The Attorney General has no ability during the administrative process to compel Texas' production of information, and the administrative process is informal and not geared towards producing admissible evidence.

On July 25, 2011, almost two months after Governor Rick Perry signed S.B. 14 into law, Texas submitted the legislation to the Department of Justice for an administrative determination as to whether the proposed changes had neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, pursuant to Section 5 of the Voting Rights Act. Ex. 1, Letter from Ann McGeehan, Dir. of Elections, State of Texas, to T. Christian Herren, Jr., Chief, Voting Sect., Dep't of Justice (July 25, 2011). Notwithstanding the delay between the date of enactment and the date of submission, the State nevertheless requested that the Department conduct an expedited review. *Id.*

The State of Texas' initial submission included only a cover letter, a copy of S.B. 14, and information related to voter turnout in Georgia after implementation of that State's photographic voter identification law.[1] In August 2011, the Department of Justice repeatedly contacted the State to request data on the number, and the race or national origin, of registered voters in Texas who do not have photo identification.[2] On September 23, 2011, the Department informed Texas that it had not submitted sufficient information to enable the Department to reach a determination

[1] The Attorney General has sixty days to preclear a proposed change, ask in writing for additional information, or object to the proposed change. *See* 28 C.F.R. §§ 51.37(b), 51.41(a), 51.44(a). If the Attorney General makes a written request for additional information needed to make a submission complete, a new 60-day review period commences upon the receipt of the requested additional information. *See* 28 C.F.R. § 51.37(b).

[2] This information is central to the question of whether the voting change at issue would have a retrogressive effect. *See* Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51.26 (detailing the required contents for Section 5 submissions).

under Section 5 and made a written request for more information from the State. Ex. 2, Letter from T. Christian Herren, Dep't of Justice to Ann McGeehan, Dir. of Elections, State of Texas (Sept. 23, 2011).

The State partially responded on October 4, 2011 to the Department's request for more information, but did not supply crucial data about "the number of registered voters in Texas, by race and Spanish surname within county of residence, who currently possess a Texas driver license or other form of photo identification issued by [the Department of Public Safety (DPS)] that is current or has expired within sixty days," *id*. at 5A, until January 12, 2012, over three months after the Department's initial request.[3] Ex. 3, Letter from Keith Ingram, Dir. of Elections, State of Texas to T. Christian Herren, Chief, Voting Sect., Dep't of Justice (Jan.12, 2012). On March 12, 2012, the Attorney General notified the State of his administrative determination that an objection be interposed to S.B. 14 because the State had not met its burden of showing that S.B. 14 would not have a retrogressive effect on minority voters. Ex. 4, Letter from Tom Perez, Asst. Attorney General, Civil Rights Division, Dep't of Justice to Keith Ingram, Dir. of Elections, State of Texas (Mar. 12, 2012).

B. The State's Ongoing Failure to Produce Essential Discovery, Prejudicial Delays in Producing Discovery, and Sequential Assertion of Various Privileges

Because nearly all information relevant to Texas' statutory claim lies in the State's possession, the Attorney General's ability to collect and analyze the relevant material on an expedited schedule hinges in large part on Texas' capacity and cooperation in meeting the rigorous discovery deadlines ordered in the Order re Expedited Discovery (Mar. 15, 2012) and

[3] In its response, the State disavowed the accuracy and reliability of the data.

Initial Scheduling Order (Mar. 27, 2012).[4] Time and time again, despite the State's persistent demands that this case be resolved by August 15, 2012, Texas has repeatedly failed to meet discovery deadlines.[5] As a result, the Attorney General has not received essential documents from the State. In addition to these delays in document production, Texas has chosen to invoke several privileges, whose contours still remain unclear, on a rolling basis and was tardy in producing privilege logs necessary to allow analysis of the State's assertions of privilege. The State's document production of April 20 does not remedy or otherwise alleviate the harm created by the State's delays in production. With a truncated period for discovery, every day of delay has adverse consequences.

1. The Attorney General's Good Faith Efforts to Facilitate Expedited Discovery

The Attorney General's efforts to conduct efficient discovery began with his initiation of a cooperative effort to put in place both an agreement concerning the production of electronically stored information ("ESI") and a protective order designed to safeguard sensitive personal information. The Attorney General first requested a discussion concerning ESI pursuant to Fed. R. Civ. P. 26(f)(3)(C) on March 16, 2012 and a telephonic conference occurred on March 19. At this conference, the State assured the Attorney General that it would produce requested databases in their entirety. The Attorney General also proposed a production methodology, with which the State raised no concerns, and the Attorney General thereafter circulated a formal proposed

[4] On January 24, 2012, Texas filed this declaratory judgment action, seeking an expedited judicial review of whether S.B. 14 has purpose or effect of denying the right to vote on account of race, color, or membership in a language minority group. (ECF 1). On March 14, 2012, Texas represented that a decision by August 15, 2012 was necessary in order to allow sufficient time for Texas to implement the law prior to the November elections, should the Court find for Texas. Tr. at 8:16-9:7 (Mar.14, 2012) (Ex. 5). On March 15, 2012, the Court ordered an expedited schedule. (ECF 17).

[5] The Court has expressed repeated concerns about the State's dilatory approach to discovery and admonished the State to produce discovery promptly in light of the trial date. *See, e.g.* Tr. at 9:3-22 (Mar. 27, 2012); *id*. at 14:7-23 (Mar. 27, 2012); *id*. at 15:3-17; *id*. at 16:7-17:8; Tr. at 10:18-25 (Apr. 10, 2012); *id*. at 24:16-22; *id*. at 31:25-33:13; Tr. at 7:19-8:6 (Apr. 16, 2012).

agreement within hours of the meeting. The State proposed changes two days later, which allowed for entry of the ESI agreement on March 22. (*See* ECF 33).

Similarly, the Attorney General circulated a proposed protective order on March 19, 2012, several days before the parties had contemplated filing a joint protective order with the Court. *See* Proposed Joint Scheduling Order. (ECF 26). The State did not respond until March 22, when it raised concerns that the protective order would infringe on state privacy law. On March 23, the Attorney General notified the Court that the parties were at an impasse, (*see* ECF 39), and the Court ordered briefing during a conference on March 26. In response to the Attorney General's motion for entry of his proposed protective order, (*see* ECF 44), the State filed a lengthy brief relying on a footnote in *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996), to argue that information deemed confidential under state law is not discoverable in federal litigation. (*See* ECF 54). The Court ordered entry of the Attorney General's proposed protective order, with a modification proposed by the Defendant-Intervenors, the next day. *See* Minute Order re 44 Motion (Mar. 30, 2012).

Pursuant to the expedited discovery order, the Attorney General also immediately undertook discovery. On March 19, 2012, the Attorney General sent a letter to the State identifying legislators whom he would seek to depose and categories of documents he would seek from those witnesses. Ex. 6, Letter from Jennifer Maranzano, Dep't of Justice to Jonathan Mitchell, Solicitor General, State of Texas (Mar. 19, 2012). On March 20, 2012 the Attorney General served his initial disclosures and propounded interrogatories and requests for production of documents on the State.

The Attorney General has likewise timely responded to the State's April 13 written discovery requests.[6] In response to the State's interrogatories and requests for production of documents, the Attorney General served interrogatory responses within the seven-day period required by the scheduling order on April 20, 2012, and responses and objections to requests for production at 12:33 a.m. EDT on April 21, 2012. The Attorney General produced a privilege log on April 21, 2012 and sent by express delivery responsive, nonprivileged documents within his possession, custody, and control to the State for arrival on April 23, 2012.

2. The State's Persistent Failure to Timely Produce Essential Discovery

On March 30, 2012, the State responded to the Attorney General's discovery requests. However, these responses were incomplete, non-responsive, and deficient on their face. *See* Ex. 7, Letter from Jennifer Maranzano, Dep't of Justice to Jonathan Mitchell, Solicitor General, State of Texas (Apr. 2, 2012) (cataloguing deficiencies). Of particular concern was the State's indication that for each request, it would produce relevant, responsive, non-privileged documents request "on a rolling basis as they become available." Ex 8, Pl.'s Objections and Resp. to Def.'s First Set of Req. for Produc. (Mar. 30, 2012) at Resp. to Req. for Produc. Nos. 1-19. While the State's initial production included portions of the legislative history for S.B. 14 (2011) and S.B. 362 (2009), the State failed to produce any documents beyond these incomplete legislative history records until April 13, 2012, more than three weeks after the Attorney General served his discovery.

The State's document production remains deficient and incomplete in at least two significant respects – both of which impact the rapidly approaching deadlines for expert

[6] Despite the Court's order bifurcating the State's statutory and constitutional claims, (ECF 43, ¶ 1), the State propounded numerous discovery requests wholly irrelevant to the State's statutory judicial preclearance claim, sought information outside the Attorney General's control, and sought information covered by well-established privileges.

disclosures and dispositive motions. First, as the State has known since at least September 2011, the Attorney General must analyze the state voter registration, driver license, and license to carry concealed handguns databases to determine the effect of S.B. 14 on the State's minority voters.[7] Although the Initial Scheduling Order required the State to provide these databases to the Attorney General on March 30, 2012, (*see* ECF 43 ¶ 5), that same day Texas informed the Attorney General that it could only transfer the databases via hand delivery to the U.S. Attorneys' office in Austin, Texas. Counsel for the Attorney General departed for Austin within an hour, but the State then informed the Attorney General it would still not provide full databases – notwithstanding the Court's order that morning entering a protective order – requiring further intervention by this Court. *See* 1st and 4th Minute Order (Mar. 30, 2012).[8]

Despite the multiple efforts of the Attorney General and the Court[9] to persuade the State to produce all relevant fields of the databases, Texas has still not complied, and the Attorney General remains without the necessary information to conduct an analysis to determine the effect of S.B. 14 on the State's minority voters. This is true even though the State repeatedly assured the Court and the parties, as early as March 21, 2012, (ECF 26), that it would produce full access to the pertinent state databases, information about all the fields in the pertinent state databases, and all necessary fields. On April 17, 2012, the State's own witnesses gave deposition testimony

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[7] *See* Ex. 2.

[8] The State equivocated about the amount of time it needed to produce its driver license database with full social security numbers, requiring the Court to order that the State produce the database with full social security numbers to the Attorney General by Monday, April 2, 2012. *See* 4th Minute Order (Mar. 30, 2012).

[9] *See* Doc 43, ¶ 5 (ordering that the State provide "all available underlying data necessary for purposes of comparing the data in these databases against each other"); Tr. at 16:11-17:23 (Mar. 27, 2012) (Court in response to State's offer to produce the databases by Friday, April 6, ordering state to produce databases by Friday, March 30, 2012); Tr. at 30:21-31:5 (Apr. 10, 2012) (Court noting that there are two orders instructing the State to produce pertinent databases); *id*. at 47:8-47:16 (ordering the State to turn over to Defendant-Intervenors the driver license database with the last four digits of social security numbers).

that indicates the database fields produced are insufficient to enable the Attorney General to identify persons who have forms of identification allowable under S.B. 14, that is, an unexpired driver license, personal identification card, or license to carry a concealed handgun, or one that expired within sixty days of presentation.[10] As to the state voter registration database, Texas has failed to produce any document that explains the database's fields,[11] nor did it properly designate a witness, pursuant to Defendant-Intervenors' Rule 30(b)(6) deposition notice, who was able to answer basic questions about the fields that the State has produced.[12]

Second, Texas has failed to produce a comprehensive and complete legislative history of S.B. 14 and past photo identification bills, the need for which the Court itself characterized to be as "predictable as the sun coming up." Tr. at 14:7-21 (Apr. 10, 2012). To date, Texas has only produced partial transcripts of floor considerations of S.B. 14, partial transcripts from the floor

[10] *See* Ex. 9, Dep. of Germaine Martinez (Apr. 17, 2012), 69:15-76:7 (not possible to identify persons in the driver license database with an unexpired driver license without having the database field containing the driver license expiration date); 76:20-77:13 (not possible to identify persons in the driver license database who have a current personal identification without personal identification field and expiration date field); Ex. 10, Dep. of Cherry L. Johnson-Lawson (Apr. 17, 2012), 49:21- 52:7 (the field "License Application Status" in the license to carry concealed handgun database, had it been produced to the Attorney General, would allow for the identification of persons who have an unexpired license to carry a concealed handgun); *see also* Ex. 11, Letter from Ezra Rosenberg, Dechert LLP, to Matthew Frederick, Special Counsel, Office of the Attorney General, State of Texas (Apr. 20, 2012).

[11] *Cf.* Ex.12, Dep. of Gloria Martinez (Apr. 17, 2012), 42:19-42:23 (unaware of whether there is a manual for operating the voter registration database). On April 10, 2012, the State represented to the Court that the entire set of fields in the voter registration database include: name of resident, mailing address, date of birth, driver license number, last-four digits of the social security number, and an indication of whether the person wishes to be an election worker. Tr. at 33:15-34:18. However, Gloria Martinez, the State's designated Rule 30(b)(6) witness on the voter registration database, testified in her deposition that the voter registration database has over a hundred fields. Tr. at 24:17 -23 (Apr. 17, 2012).

[12] Ex. 12, 44:16- 46:3, 47:1-48-:6, 50:19-51:12 (unable to define database fields entitled "voter county ID," "Juror ID," "County Number," or the codes "Z" or "V" under "Voter Status Code").

consideration of S.B. 362 (2009), and no transcripts from photographic voter identification bills considered in the 80th (2007) or 79th (2005) legislatures.[13]

In addition, Texas has been tardy in responding to many other discovery requests. For example, Texas did not produce any documents from the Secretary of State's office, which are likely to prove central to the State's statutory claim, until April 20, 2012. Not only were these documents produced a month after the Attorney General's discovery requests, but Texas refused to commit to producing all responsive documents from the Secretary of State by April 20, 2012 (*See* Notice of Disputed Discovery Issues, ECF 80). Consequently, additional responsive documents from the Secretary of State and possibly other offices[14] may be forthcoming.

The State also interposed similar unwarranted and unresolved delay in response to requests for the production of relevant and responsive email. The Attorney General first requested email from the State as part of his First Set of Requests for Production on March 20, 2012. Ex. 13, Def.'s First Set of Req. for Produc. (Mar. 20, 2012). In the first of its rolling document productions on March 31, the State did not produce any email. Since that date, the

[13] In fact, Texas has not even met its own, self-imposed deadlines for producing legislative records. (*See* ECF 70). After being ordered by the Court to notify all parties of the date by which it would produce the complete legislative history for S.B. 14 and previous photo identification bills, Texas filed, on April 11, 2012, a Notice Regarding Production of Legislative History (ECF 70) ("Notice"). In this Notice, the State represented that it would produce "the written legislative history for voter identification bills considered by the 79th, 80th, and 81st Legislatures by Friday, April 13, 2012." (ECF 70, at 3). Yet, the State did not produce these documents until April 16, 2012. The State also represented that it had produced partial transcripts of the consideration of S.B. 14 by the Senate Committee of the Whole. (ECF 70, at 4). Notably, the State still has not produced transcripts from January 26, 2011, the date on which the Senate considered amendments to S.B. 14, and not until April 20, 2012, produced the transcript from May 9, 2011, when the Senate passed S.B. 14 as amended by the conference committee. Additionally, to date, the State has not yet produced the transcript of the House floor consideration of S.B. 14, transcripts from the House floor consideration of S.B. 362 in the 81st legislature, or any transcripts from the 80th (2007) and 79th (2005) legislature. On April 20, 2012, the State produced Bates stamped copies of the House and Senate Journal records from the 80th and 79th legislatures, which had been produced without Bates stamps on April 16, 2012.

[14] The State has made no assurances about whether the production from other offices is complete.

Attorney General has been diligently negotiating with Texas on nearly a daily basis on acceptable search terms, identification of individuals whose email should be searched, and the order in which to search individual accounts. Only earlier today, the State agreed to begin searching email according to a rank order of individuals named by the Attorney General and to provide a status report concerning the pace of the search and review on Thursday, April 26.[15]

The State has also delayed in responding to several of the Attorney General's interrogatories. Notwithstanding Texas' statement on April 10, 2012, that it would answer interrogatories 11 and 12, *see* Tr. at 43:7-44:8 (Apr. 10, 2012), which pertain to in-person voter fraud, voting by non-citizens, and training, voter education, and voter outreach associated with S.B. 14, the State did not answer these interrogatories until ten days later on April 20, 2012, a period of time that is longer than the seven-day period allowed by the Initial Scheduling Order to respond to written discovery requests. (ECF 43, ¶ 3).

3. The State's Serial Assertion of Various Privileges and Delay in Production of Privilege Logs

The State has also injected significant delay into the schedule through its decision to interpose a series of various and shifting privileges.[16] On March 14, 2012, Texas indicated that it would "probably be asserting privilege" over testimony and documents sought from

[15] On April 4, the Attorney General requested a meet and confer with the State's technical staff in order to ascertain the software that would be used to search for email – a required step to devise appropriate search terms – and after repeated email correspondence the State eventually made its staff available on April 10. On April 12, the Attorney General proposed search terms. On April 16, the State relayed a response from two of the four email custodians objecting to some of the terms, without including a counterproposal. The Attorney General responded to these objections on April 17 and requested that the State both confirm that the search terms as modified would be acceptable to all email custodians and that Texas would commence search of all individuals known to the State to be likely to hold discoverable documents. The same day, the State demanded that the Attorney General name each individual whose email should be subject to search but did not address the search terms. It was not until April 19, 2012 that agreement was reached on the search terms.

[16] *See also*, Tr. at 28:15-17 (April 10, 2012) ("We've had a whole briefing on privilege and you didn't mention that one and now you're asserting it to stand in the way of discovery.").

legislators. Tr. at 7:16-8:7 (Mar. 14, 2012), and the Court ordered the parties to confer informally about legislator witnesses. *See id.* at 15:13-17:24. On March 19, 2012, the Attorney General identified the legislators whom it would seek to depose, as well as categories of documents it would seek from those witnesses. Ex. 5.

On March 22, 2012, the State filed a motion for protective order in which it invoked legislative privilege as to communications between legislators, legislators and staff, and legislators and their constituents, (ECF 34-4). The State did not, however, at that time invoke the privilege as to communications between legislators and executive agencies, or those between legislators and the Texas Legislative Council, notwithstanding the State's receipt of the Attorney General's discovery requests which plainly sought such discovery, Def's First Set of Req. for Produc. (Mar. 20, 2012), recent litigation in this Court under Section 5 specifically over the Texas Legislative Council's privileges, *see Texas* v. *United States*, No. 1:11-cv-1303, 2012 WL 11241, at **9-10 (D.D.C. Jan. 2, 2012), and the Court's remarks suggesting that any such privilege as to the Texas Legislative Council should be briefed and ruled upon expeditiously. Tr. 15:13-17:24 (Mar. 14, 2012).

On March 30, 2012, the State served responses to the Attorney General's interrogatories and requests for production in which it for the first time asserted the deliberative process privilege and the Texas Government Code § 323.017 throughout. Pl.'s Objections and Resp. to Def.'s First Set of Req. for Produc. (Mar. 30, 2012) at Resp. to Req. for Produc. Nos. 1-4, 7-19. By letter dated April 2, 2012, the Attorney General asked the State to withdraw those objections, Ex. 6, and in response, the State maintained its position.

During a subsequent telephonic status conference on April 10, 2012, Texas indicated for the first time that legislators might assert legislative privilege over communications between

legislators and the governor's office, and legislators and the Texas Legislative Council, notwithstanding the State's failure to include those communications in its motion for a protective order based on legislative privilege. Tr. at 17:20-20:25 (Apr. 10, 2012); ECF 34. Texas also indicated that it would assert attorney-client privilege over communications between legislators and the Texas Legislative Council, notwithstanding a ruling to the contrary in another pending Section 5 case in this Court in which Texas is the plaintiff. *See Texas v. United States*, No. 1:11-cv-1303, 2012 WL 11241, at **9-10 (D.D.C. Jan. 2, 2012); Tr. at 28:3-28:13 (Apr. 10, 2012).

On April 13, 2012, the State produced, among other things, a privilege log that failed to set forth the basis for the State's assertion of attorney-client privilege as to numerous documents in the possession of the Office of the Governor. In particular, the privilege log fails to identify the author or recipients of such documents or provide a useful description of the document at issue. Ex. 14. Moreover, the State produced additional documents from the Governor's office on April 20, 2012 and failed to include any privilege log.

On April 17, 2012, the parties filed a joint report on discovery issues in dispute in which the parties agreed to a briefing schedule on a motion to compel discovery for which the State has invoked deliberative process privilege, legislative privilege as to communications between legislators and agencies and legislators and the Texas Legislative Council, and attorney-client privilege as to communications between legislators and the Texas Legislative Council. The parties agreed to a briefing schedule that will not conclude until May 3, 2012. (ECF 80).

On April 20, 2012, the Court denied without prejudice the State's motion for a protective order based on legislative privilege and ordered Texas, by April 24, 2012, to identify those legislators from whom the Attorney General or Defendant-Intervenors seek discovery who assert a legislative privilege. (ECF 84). In the Order, the Court makes clear that it anticipates

subsequent motions regarding legislative privilege that may arise when an individual legislator resists a subpoena or document discovery.

C. Remaining Deadlines in the Initial Scheduling Order, Including the Trial Date of July 9, 2012, are Impractical and Prejudicial to the Attorney General

The State simply cannot flout the rigorous discovery deadlines set forth in the Initial Scheduling Order while demanding adherence to a trial date of July 9. The State's numerous and ongoing delays have created cascading deleterious effects on the schedule and prejudiced the Attorney General in defending this action.[17] Such delays and failures to produce all relevant databases containing the necessary relevant fields, full legislative histories of S.B. 14 and all pertinent photo identification bills, documents from key executive agencies charged with enforcing and implementing S.B. 14, and complete privilege logs prevent the Attorney General from analyzing the central legal issues of whether the State acted with discriminatory purpose in enacting S.B. 14 or whether S.B. 14 will have a discriminatory effect. Now, less than three months before the trial date and one-third of the way through discovery, the Attorney General still lacks critical information in response to his document requests served on March 20, 2012. Further, it remains unclear when briefing over legislative privilege will conclude and whether, as the State has suggested, appeals or mandamus will be taken. *See* Tr. at 13:15-15:15 (March 21, 2012).

Consequently, all parties have even less time in which to review documents, identify relevant witnesses, and depose those witnesses. In turn, the State's delays in production of necessary discovery hinder the ability of the Attorney General to have at his disposal facts

[17] The Court itself recognized that the State's discovery delays have prejudiced the Attorney General. *See* Tr. at 8:14-8:16 (Apr. 10, 2012) ("Well, the problem that we have is that procedural delay is very prejudicial to the defendants given the schedule.").

necessary for any expert reports to be prepared; to file or respond to a dispositive motion, exchange trial exhibits, enter into stipulations; or otherwise to prepare for trial.

The State's decision to invoke additional privileges subsequent to the filing of its motion for a protective order further complicates discovery. The parties have agreed to complete the briefing of Attorney General's motion to compel discovery responses, which will address the additional privileges the State now asserts, by May 3, 2012. Even assuming that a ruling issues shortly thereafter, the parties will have less than thirty days before they must make expert disclosures on June 1, 2012, as required by the Initial Scheduling Order.

While it is certain that briefing on the State's assertion of deliberative process and several other privileges will not be completed until May 3, 2012, there is no clear end in sight to briefing on other privilege issues, particularly in light of the Court's order of April 20, 2012, which allows the Attorney General to move to compel testimony and documents from the legislators and staff who assert legislative privilege. While Texas indicated on April 3, 2012 that it is aware of three legislators who wish to invoke such a privilege, it has not yet identified those legislators. Tr. at 9:13-10:15 (Apr. 3, 2012).

The Attorney General will be required to subpoena at least three legislators,[18] and Texas will likely move to quash these subpoenas. Resolving these motions will be fact intensive, as suggested by the Court's order on the State's motion for a protective order, and may well present varied and complex issues regarding waiver. Full and final resolution of these privilege disputes,

[18] On April 20, 2012, Texas filed a notice that listed legislators sought by the Attorney General for deposition who, if the Court "rejects some of all of Texas's claims" in its motion for a protective order, will accept a notice of deposition in lieu of a subpoena. The State's list did not include the following legislators identified by the Attorney General: Representative Leo Berman, Representative Joe Straus, Representative Larry Gonzales. *See* ECF 83, Ex. 6 (US letter, 3/19) and Ex. 15 (email from Jennifer Maranzano, Dep't of Justice to Matt Fredrick, Office of Attorney General, State of Texas (Apr. 17, 2012). The State has not listed any legislative staff witnesses, and the Attorney General intends to seek clarification from the State on whether any staff will appear without a subpoena.

such that the Attorney General may obtain the discovery sought if a Court rules in his favor, seems nearly impossible under the current discovery deadline.

CONCLUSION

The expedited schedule in the Initial Scheduling Order, entered at the State's request, has now collapsed as a result of the State's own conduct during the limited discovery period to date and rendered a trial date of July 9, 2012 impractical. The Attorney General therefore respectfully requests that the trial date be reset after all privilege motions are filed, briefed, and ruled upon.

Date: April 23, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2012, I served a true and correct copy of the foregoing via the Court's ECF system on the following counsel of record:

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